

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

LIBERTY ENTERPRISES, LLC

CASE NO. 03-63074

Debtor

Chapter 11

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Presently before the Court is a motion filed by Roland J. and Aija Adamsons and Riga Farms, Inc. (the “Movants”) on July 3, 2003, seeking to lift the automatic stay under § 362(d)(1) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), in order to continue proceedings in Herkimer County Supreme Court (“State Court”) against Liberty Enterprises, Inc. (“Liberty” or the “Debtor”) to foreclose on real property located at Rock Hill Road in the towns of German Flatts and Warren in Herkimer County, New York (the “Subject Property”). Alternatively, the

Movants seek an order, pursuant to Code § 1112(b), dismissing or converting the Debtor's case to chapter 7. The Debtor filed an objection on July 23, 2003, to which the Movants responded on July 28, 2003.

The Court heard argument on the motion during its regular motion term in Utica, New York on July 29, 2003. In order to determine the extent of the Debtor's equity in the Subject Property and whether the Debtor's case should be dismissed or converted to chapter 7, the Court convened an evidentiary hearing in Utica, which was commenced on September 17, 2003, and was continued on October 29, 2003 and November 21, 2003. During the hearing, the Movants and the Debtor presented the testimony of their respective appraisers, Richard C. Smith ("Smith") and George H. Cade ("Cade"). The Court also heard the testimony of the Debtor's managing member, Richard Bach ("Bach"), as well as Roland J. Adamsons ("Adamsons"), one of the Movants. At the close of the hearing, the Court provided the parties an opportunity to submit posthearing statements. The matter was submitted for decision on December 29, 2003.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(2)(A), (G), and (O).

### **FACTS**

# **I. The Subject Property, its financing, and the foreclosure proceedings**

A land contract executed by Liberty and the Movants on May 17, 1999 (the “Land Contract”) provides that the Subject Property consists of 483.6 acres. Land Contract ¶ 1. The Subject Property is a dairy farm that consists of the following structures:

two-story dwelling	horse barn
1.75-story dwelling	pole barn
two-car garage	paddock
dairy barn	silo room
milk house	two concrete stave silos
	Harvestor silo

There is also one double- and one single-wide manufactured home on the Subject Property that will not be included in the valuation because they are not property of the Debtor.

The Land Contract provides that Liberty pay the Movants \$7,249.81 per month over five years for a total purchase price of \$375,000. Land Contract ¶ 2(a) & Sched. B. Upon the payment of the full amount under the Land Contract, the Movants are required to deliver the deed for the Subject Property to Liberty. *Id.* ¶ 4. Liberty’s failure to make a monthly payment within sixty days after it is due constitutes an event of default under the Land Contract, entitling the Movants to re-occupy the Subject Property and treat all prior payments as rent. *Id.* ¶ 10.

According to the Movants, Liberty has not made payments under the Land Contract since January 2001. Aff. of Amy F. Quandt, Esq., filed July 3, 2003 (“Quandt Aff.”), ¶ 6. Liberty filed a complaint against the Movants in State Court on November 23, 2001, in which it sought specific performance of the Land Contract. Aff. of James W. Hyde, IV, Esq., filed July 23, 2003 (“Hyde Aff.”), at Ex. C. In the Movants’ answer filed with the State Court, they counterclaimed, seeking to foreclose on the Subject Property. Quandt Aff., at Ex. B. On March 21, 2003, the State Court entered a Judgment of Foreclosure and Sale in connection with the Subject Property.

*Id.* at Ex. D. The foreclosure sale was scheduled for May 5, 2003; Liberty filed a chapter 11 petition on May 2, 2003. The Movants allege that, as of the petition date, the Debtors owed them approximately \$354,000, which includes arrears on the Land Contract, attorney's fees expended in the State Court proceeding, and unpaid taxes and insurance for the Subject Property. *Id.* ¶ 15.

## **II. The appraisals**

In order to support their positions regarding the extent of the Debtor's equity in the Subject Property, at the evidentiary hearing the Movants and the Debtor submitted the appraisals of Smith and Cade, respectively. Smith and Cade were qualified as expert witnesses at the evidentiary hearing and were examined and cross-examined by counsel for both parties.

### **A. Smith's appraisal**

Smith prepared his appraisal of the Subject Property as of August 24, 2003. He utilized the cost, market-comparison, capitalization of income, and net present value approaches. Smith opined that the highest and best use of the Subject Property was as a dairy farm. Relying principally on the market-comparison approach, Smith appraised the Subject Property at a value of \$320,000. Smith also opined, however, that a hypothetical purchaser seeking to develop a subdivided residential housing project on the Subject Property may pay more than his appraised value.

Utilizing the cost approach, Smith valued the Subject Property's land at \$178,000, according 200 tillable acres a value of \$500 per acre and the remaining 260 acres of pasture, wood lot, and brush a value of \$300 per acre.<sup>1</sup> Smith attributed a value of \$144,000 to the

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<sup>1</sup> Smith also used these per-acre values to calculate his land adjustments for the market-comparison method.

dwellings, barn complex, silos and other improvements, fixing the total value of the Subject Property under the cost approach at \$322,000.

Smith arrived at a rounded total value of \$237,000 utilizing the capitalization of income approach. Smith calculated the annual net dairy income as \$16,625. He arrived at a final valuation by capitalizing the net dairy income figure using a capitalization rate of seven percent. Smith assumed that the dairy facilities on the Subject Property have a capacity of 118 cows. A gross annual income figure of \$384,077 was derived by multiplying 118 cows by an average per-cow income of \$3,254.89. Annual per-cow operating expenses were fixed at \$3,114, which when multiplied by 118 produces an annual expense figure of \$367,452. The 2002 Northeast Dairy Farm Summary was the source for Smith's annual income and expense figures.

Smith also appraised the Subject Property under the net present value approach, which he admitted was "not typical" and was done only at his client's request. The net present value approach produced a value that assumed the immediate sale of the Subject Property, which Smith characterized as a depressed sale value. Smith's arrived at a value of \$264,000 under this approach.

Relying upon the market-comparison approach, Smith valued the Subject Property at \$320,000. Smith provided the following comparable sales in his appraisal:

*Sale #1*

Route 145  
 Cobleskill, NY (Schoharie County)  
 Sold on April 21, 2001 for \$315,000  
 417 acres, 60% tillable  
 Downward adjustment of \$12,000

*Sale #2*

County Route 19  
 Exeter, NY (Otsego County)  
 Sold on October 24, 2001 for \$300,000  
 464 acres, 47% tillable  
 Upward adjustment of \$32,000

*Sale #3*

County Route 54  
 Cherry Valley, NY (Otsego County)  
 Sold on November 16, 2001 for \$350,000  
 300 acres, 67% tillable  
 Downward adjustment of \$20,000

*Sale #4*

Caldwell Road  
 Herkimer, NY (Herkimer County)  
 Sold on November 27, 2002 for \$290,000  
 300 acres, 58% tillable  
 Upward adjustment of \$57,500

*Sale #5*

434 McKoons Road  
 Columbia, NY (Herkimer County)  
 Sold on May 2, 2002 for \$235,000  
 250 acres, 60% tillable  
 Upward adjustment of \$88,000

Smith adjusted the original sale prices of Sales #1 through #5 to account for relative differences in the extent and quality of the land, buildings, and locations of the properties as compared to the Subject Property.

Smith testified that dairy farm appraisals are principally based on cow capacity, acreage, or productivity potential and that buildings such as dwellings only contribute to a farm's value. Smith testified that the unproductive quality of the Subject Property's tillable land was a factor that contributed to the adjustment of all of the comparable sales, especially Sales #3 and #5, which are conducting active farming operations. Smith opined that a prospective buyer would have to invest funds in addition to the purchase price of the Subject Property in order to

commence farming operations there. Smith also adjusted Sale #3 downward \$50,000 to account for its proximity to Cooperstown, New York. Further examination of the locations of the various properties revealed that Sale #3 was only five miles closer to Cooperstown than the Subject Property. Smith also noted that one of the dwellings on the Subject Property was uninhabited and in a state of disrepair and that he noticed evidence that its roof had collapsed.

#### **B. Cade's appraisal**

Cade appraised the Subject Property as of July 15, 2002, utilizing the market-comparison approach.<sup>2</sup> Cade did not utilize a capitalization of income approach because he asserted that he could not find enough comparable dairy farm rental properties to establish a gross rent multiplier. Explaining his decision not to utilize the cost approach, Cade cited the cost approach's unreliability. Cade opined that the highest and best use of the Subject Property was as a dairy farm. Relying on the market-comparison approach, Smith appraised the Subject Property at a value of \$456,400.<sup>3</sup>

Cade relied on the following comparable sales:<sup>4</sup>

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<sup>2</sup> Cade's appraisal comprised, in addition to the Subject Property, a valuation of a dwelling and a horse farm and racetrack, which the Court disregarded.

<sup>3</sup> This figure includes a discount of \$82,300 to account for the exclusion of the two manufactured homes on the Subject Property that were valued in Cade's initial appraisal.

<sup>4</sup> Cade's Sale #2 and #3 are identical to Smith's Sale #5 and #3, respectively.

*Sale #1*

869 Elizabethtown Road  
 Columbia, NY (Herkimer County)  
 Sold for \$365, 000 on December 19, 2001  
 247.5 acres  
 Dwelling, dairy barn, 3concrete stave silos,  
 2 pole barns, garage, 3 porches  
 Upward adjustment of \$206,060

*Sale #2*

434 McKoons Road  
 Columbia, NY (Herkimer County)  
 Sold for \$235,000 on May 2, 2002  
 247.5 acres  
 Dwelling, dairy barn, 3 concrete stave silos,  
 2 pole barns, garage  
 Upward adjustment of \$239,806

*Sale #3*

County Highway 54  
 Cherry Valley, NY (Otsego County)  
 Sold for \$350,000 on November 16, 2001  
 299.5 acres  
 Dwelling, dairy barn, 2 concrete stave silos,  
 pole barn, garage, 2 porches  
 Upward adjustment of \$220,253

Cade also used a land sale at Hoke and Cramer Road in the town of Stark in Herkimer County, New York as a partial basis for his average per-acre raw land value. This property consists of seventy-six acres whose sale price reflected a value of \$507 per acre. Cade adjusted Sales #2 and #3 \$67,506 and \$30,516, respectively, to reflect their reduced acreage, based on a per-acre value of \$600. The acreage of Sale #1 was adjusted \$41,106, based on a per-acre value of \$400. Cade testified that he used a lower per-acre figure for Sale #1 to account for that property's superior land quality relative to the other comparable properties.

Cade otherwise adjusted the comparable sales to reflect the square-foot deviations of each of the comparable properties' buildings relative to the Subject Property's buildings. Cade admitted that cow capacity and tillable acreage were important factors for the prospective dairy farm purchaser. However, Cade's appraisal did not account for these factors. Cade testified that he found it unnecessary to make adjustments based on tillable acreage because the Subject



Property had a similar percentage of tillable acreage as the comparable sales. Cade also added that, unlike appraisals for residential properties, an appraisal for a complex property such as a dairy farm could include unlimited adjustments to comparable sales without diminishing the comparability of that property.

### **III. The testimony of Richard Bach**

The Movants subpoenaed Bach, the managing member of the Debtor,<sup>5</sup> to testify. Bach is also president and owner of Mohawk Management. Bach's testimony was addressed to the issue of whether the Debtor filed its petition in bad faith.

At the evidentiary hearing, the Movants entered into evidence the Debtor's chapter 11 petition and accompanying schedules, Statement of Financial Affairs, and monthly operating reports for the months of May through July 2003. Bach was asked to explain the source of the Debtor's rent revenues as they appear on its monthly operating reports. Bach testified that the Debtor received rent from tenants residing in a dwelling and in a manufactured home located at the Subject Property and from a tenant residing on the Debtor's real property located at Robinson Road in Mohawk, New York.<sup>6</sup> The Movants questioned Bach regarding the differing figures for rent revenue as they appear on the monthly operating reports and for rent income as it appears on the Debtor's Schedule I. Bach explained that the revenue figures in the monthly operating reports were greater because they reflect total receipts, while the income figure set out in the

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<sup>5</sup> The other members of the Debtor are Bach's wife, Judith (together with Bach, the "Bachs"), and his daughter, Erika.

<sup>6</sup> The Court is aware that the Debtor is collecting rent from a tenant residing in a manufactured home that the Debtor contends it does not own. No explanation for this apparent discrepancy appears on the record and the Movants did not challenge this assertion at the hearing.

Debtor's Schedule J reflects receipts less expenses.

The Movants also questioned Bach about various loans involving Bach himself, the Bachs, Erika Bach, Mohawk Management, and the Debtor. Bach testified that the Debtor periodically received payments from the Bachs to reimburse loans made by the Debtor to the Bachs. The Debtor's Statement of Financial Affairs at question 3B also revealed prepetition payments to the Bachs within one year prepetition. Statement of Financial Affairs, filed May 19, 2003, at 3B. The Debtor's Schedule B listed various extensions of credit to Mohawk Management, Bach, and the Bachs. Sched. B to Debtor's Pet'n, filed May 19, 2003. Bach testified that none of these loans were documented.

The Movants inquired as to why the monthly payments due under the Land Contract were not reflected as a monthly expense in Schedule J. Bach explained that the payments were not listed in Schedule J because the Land Contract was the subject of litigation. Bach testified that he expects that Liberty will prevail in that litigation and receive a monetary award of damages.

Bach was also asked whether Liberty commenced the bankruptcy case to avoid the foreclosure sale of the Subject Property. Bach opined that Liberty filed a chapter 11 petition in order to stay the foreclosure sale of the Subject Property and to restructure its finances and develop its properties in order to lure investors.

#### **IV. The testimony of Roland Adamsons**

The Movants offered the testimony of Adamsons as a witness in support of its contention that the Debtor filed in bad faith. Adamsons testified regarding the payment history on the Land Contract and the circumstances surrounding the negotiations between themselves and Liberty to sell the Subject Property on a closing date of August 17, 2002. Adamsons asserted that the

closing did not occur because Liberty failed to obtain financing for the sale.

## **ARGUMENTS**

The Movants contend that the automatic stay should be lifted under Code § 362(d)(1) in order to proceed with the foreclosure sale on the Subject Property on the grounds that Liberty has no equity in the Subject Property and has filed its chapter 11 petition in bad faith. Liberty's alleged bad faith filing is also the basis of the Movants' request, pursuant to Code § 1112(b), to dismiss Liberty's case or convert it to chapter 7. The Movants' allegation of bad faith is premised on the notion that Liberty filed its chapter 11 petition to evade foreclosure on the Subject Property and that the Debtor's conduct and the circumstances of this case reveal several indicia of bad faith.

The Debtor opposes the Movants' motion on the grounds that (1) it has sufficient equity in the Subject Property to adequately protect the Movants' interest; (2) it has not filed its bankruptcy petition in bad faith; and (3) its plan of reorganization seeks to fully satisfy the claims of all creditors.

## **DISCUSSION**

The first factual issue to be decided here is whether the Debtor's equity in the Subject Property is so insufficient that the Movants' interest in the Subject Property is not adequately protected, thereby requiring the Court to order that the automatic stay be lifted for cause under

Code § 362(d)(1). The other issue the Court considers is whether the Debtor filed its bankruptcy petition in bad faith, which the Movants cite as cause for lifting the stay under Code § 362(d)(1) or, in the alternative, a ground under Code § 1112(b) for dismissing the case or converting it to chapter 7.

### **I. The Debtor's equity in the Subject Property**

This valuation determination is authorized by Code § 506(a), which provides in pertinent part that a property's "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). Congress further explained that courts should determine value under Code § 506(a) "on a case-by-case basis, taking into account the facts of each case and the competing interests in the case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 356 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6312. Here, the parties have requested the Court to value the Subject Property in order to establish the amount of the Debtor's equity in the Subject Property, which is material to the question of whether the Court should order the lifting of the automatic stay for cause in order to permit the foreclosure sale of the Subject Property.

The appraisers in this case, Smith and Cade, both relied primarily on the market-comparison method to value the Subject Property. However, their results evidenced a substantial disparity: Smith's valuation was \$320,000, while Cade valued the Subject Property at \$456,400. In the Court's estimation, this discrepancy can be explained by Smith's emphasis on the Subject Property's limited tillable acreage, as compared to Cade's emphasis on the square footage of the buildings on the comparable properties.

It appears that Cade's adjustments did not consider cow capacity and tillable land as much

as it did the relative square footage of the properties' buildings. Cade conceded that the cow capacity and tillable land would be important to a prospective dairy farm purchaser. The Court does understand that a prospective purchaser may consider the Subject Property for an alternative use (*e.g.*, a residential home subdivision), and that such a purchaser may have no interest in the Subject Property's tillable acreage, cow capacity, or buildings. In light of these considerations, it appears that Cade's extensive building-based adjustments may have limited relevance to some purchasers. Further vitiating the reliability of Cade's appraisal is its age—it was prepared more than a year before the date of the hearing and the Debtor did not clearly enunciate to the Court the original purpose for which Cade prepared the appraisal—and its overbroad scope, which required the Court to tease from its seventy-three pages the data pertaining strictly to the Subject Property. Moreover, the Court has reservations about the contributory value of the additional property that Cade included in his appraisal. In other words, because the estate that was the subject of Cade's appraisal may not be the exact sum of its parts, it is difficult to rely on his valuation of the Subject Property without discounting the additive value that the Subject Property may have derived from being part of an adjoining estate with significant amenities. Accordingly, the Court must view Cade's appraisal cautiously because it cannot account for the possibility that the Subject Property may be worth less or more on its own than as a part of a larger estate, which is how it was featured in Cade's appraisal.

The Court will thus accord the greatest weight to Smith's appraisal. The Court agrees with Smith that the quality and extent of tillable land is an important factor that a prospective agricultural purchaser would consider. The Court also finds Smith's building-based adjustments reasonable. However, the Court will ignore Smith's \$50,000 location-based adjustment of Sale #3 because its proximity to Cooperstown does not vary widely enough from the Subject Property

or his other comparable sales to support such a significant adjustment. In addition, the Court will strike all of Smith's adjustments in the category described as "Other" because they were not adequately explained in his appraisal nor during his testimony.<sup>7</sup> After accounting for these modifications, the average adjusted selling price of Smith's comparable properties is \$349,100, which the Court will round to \$350,000 and adopt as its finding on the issue of the Subject Property's value.<sup>8</sup>

The question still remains whether the Debtor has sufficient equity in the Subject Property to adequately protect the Movants' interest.<sup>9</sup> The extent of a debtor's equity in a property is often considered by courts in their analysis, pursuant to Code § 362(d)(1), of whether a secured creditor's interest in that property is adequately protected. *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 207 (3d Cir. 1995); *accord In re Boodrow*, 136 F.3d 43, 53 (2d Cir. 1997).

The Movants contend that the Debtor owes them \$354,000 under the Land Contract, which includes interest, taxes, insurance, foreclosure expenses and attorney's fees. The Movants' only support for this assertion is a statement of the balance provided in the State Court's Judgment of Foreclosure and Sale, dated March 21, 2003, which incorporates the calculations of a court-appointed referee. *Quandt Aff.*, at Ex. D. The Court is also aware that the Debtor's draft

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<sup>7</sup> The adjustments for "other" were all downward and in the following amounts: \$10,000 for Sale #1; \$30,000 for Sale #3; \$20,000 for Sale #4, and \$30,000 for Sale #5.

<sup>8</sup> The Court is cognizant that this amount is \$25,000 less than the sale price set out in the Land Contract. However, there is no evidence indicating the nature of the circumstances and the regional real property market at the time of the sale to support a finding that the current value of the Subject Property must be greater than or equal to the Land Contract sale price.

<sup>9</sup> Under New York law, the parties to an installment sale of real property such as the Land Contract are considered akin to a mortgagor and mortgagee. *Connors v. Winans*, 204 N.Y.S. 142, 145 (N.Y. Sup. Ct. 1924); *see In re Mastowski*, 135 B.R. 1, 2 (Bankr. W.D.N.Y. 1992).

plan of reorganization, dated as of July 23, 2003, provides that the balance due on the Land Contract is \$231,993.92, Hyde Aff., at Ex. F, while the Debtor's most recent plan and disclosure statement filed with the Court no longer states the amount of this balance. Debtor's Disclosure Statement and Plan of Reorganization, filed Sept. 16, 2003.<sup>10</sup> However, the Court cannot accord probative weight to any of these documents because the parties did not enter them into evidence at the hearing. Nor did the parties inquire into the current amount of the balance due on the Land Contract. Therefore, because the Court cannot make a finding regarding the actual amount the Debtor currently owes on the Land Contract, the Court cannot proceed to determine the extent of the Debtor's equity in the Subject Property. Without determining the extent of equity in the Subject Property, if any, the Court must deny the Movants' motion pursuant to Code § 362(d)(1) without prejudice.<sup>11</sup>

## **II. Bad faith**

The Movants' allegation that the Debtor filed its petition in bad faith is a material element of the Movants' motion to lift the automatic stay for "cause" under Code § 362(d)(1) and to dismiss or convert the case to chapter 7 under Code § 1112(b). There is no substantive difference between bad faith as "cause" under either Code § 362(d)(1) and § 1112(b). *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d 734, 737-38 (6th Cir. 1994). Thus, the Court's analysis of "bad faith" will

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<sup>10</sup> While the Debtor's Schedule D, which stated a balance of \$262,500 on the Land Contract, was entered into evidence, its accuracy was not raised nor challenged at the hearing.

<sup>11</sup> As an aside, the Court notes that if any of the assertions made by the Debtor regarding the amount due under the Land Contract constitutes an admission under Rule 801(d)(2) of the Federal Rules of Evidence, it would appear that the Movants are adequately protected.

apply to both of the Movants' bases for relief.

Code § 1112(b) provides ten noninclusive factors for courts to consider when analyzing whether to dismiss or convert a case, including the following:

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors; [or]
- (4) failure to propose a plan under section 1121 of this title within any time period fixed by the court.

11 U.S.C. § 1121(b)(1)-(4); *see C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304, 1310-11 (2d Cir. 1997).

The instant motion was filed approximately two months after the Debtor filed its petition. The Debtor filed a disclosure statement and plan of reorganization on September 16, 2003. In light of this development, the Court finds "cause" factors (3) and (4) inapplicable. Regarding factor (2), the Court believes that it has insufficient facts before it to conclude that the Debtor cannot effectuate its plan. The Court believes that conducting a confirmation hearing on the Debtor's plan is the most appropriate method to adduce the relevant facts regarding the feasibility of Liberty's plan. By the same token, the Court must also rule out factor (1) because, while it is debatable whether the Subject Property is losing value, it is premature for the Court to conclude that the Debtor is unlikely to reorganize.

The Movants also cite the following indicia of "bad faith" as set forth in *Pleasant Pointe Apartments, Ltd. v. Ky. Housing Corp.*, 139 B.R. 828 (W.D. Ky. 1992):

- (1) the debtor has only one asset;
- (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
- (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
- (4) the debtor's financial condition is, in essence, a two party dispute



between the debtor and secured creditors which can be resolved in the pending state foreclosure action;

(5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;

(6) the debtor has little or no cash flow;

(7) the debtor can't meet current expenses including the payment of personal property and real estate taxes; and

(8) the debtor has no employees.

*Id.* at 832; *accord C-TC*, 113 F.3d at 1311. While factors (2), (4), (7) and (8) may be facially true, the Court finds that there is insufficient evidence regarding the remaining factors at this juncture of the case to find that the Debtor filed its bankruptcy case in bad faith. Moreover, the Debtor has not made payments under the Land Contract since January 2001 because it has been the subject of litigation between it and the Movants. While this conduct may hypothetically lead one to conclude that the Movants' interest in the Subject Property lacks or will lack adequate protection, it is not per se indicative of bad faith. Accordingly, the Court finds that the Debtor has not filed its petition in bad faith and that there is no cause to dismiss or convert this case to chapter 7 at this time.

Therefore, the Court will deny the Movants' motion seeking relief from the automatic stay pursuant to Code § 362(d)(1) without prejudice as well as the Movants' motion seeking an order dismissing or converting the case to chapter 7 pursuant to Code § 1112(b) with prejudice.

IT IS SO ORDERED.

Dated at Utica, New York

this 26th day of March 2004

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STEPHEN D. GERLING

Chief U.S. Bankruptcy Judge